Supreme Court, U.S.
FILED

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CARMELA F. DURKO,
Respondent,
v.

GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL AFL-CIO, CLC NO. 243,
Petitioner.

Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Union can be held liable for punitive damages as a matter of law under Title VII of the Civil Rights Act or under the Pennsylvania Human Relations Act.

2. Whether the District Court committed reversible error in excluding written determinations of the National Labor Relations Board concerning Plaintiff's unfair labor practice charges alleging that the Defendant discriminated against her.

3. Whether the District Court erred in finding that the evidence was sufficient to support the jury's determination that the Defendant Union discriminatorily failed to pursue sexual harassment grievances on behalf of Plaintiff.

4. Whether the District Court erred in refusing to remit the high punitive damages awarded against the Union, where the total damages award, including compensatory and punitive damages, constituted more than 79% of the Union's treasury, and the evidence of any Union misconduct was marginal at best.

OTHER PARTIES TO THE PROCEEDINGS

OI-NEG TV Products, Inc. was also a Defendant in this matter before the District Court and an Appellant before the United States Court of Appeals for the Third Circuit.

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OPINIONS AND ORDERS ENTERED IN THIS CASE

The District Court denied Defendant Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO, CLC, No. 243's motion for summary judgment in Durko v. OI-NEG TV Products, Inc., et al., 870 F.Supp. 1268 (M.D.Pa. 1994) The District Court subsequently entered judgment, Durko v. OI-NEG TV Products, Inc., et al., No. 4:CV-93-1284 (M.D.Pa. Dec. 31, 1995) (attached as Appendix A), and the Court of Appeals affirmed, Durko v. OI-NEG TV Products, Inc., et al., Nos. 96-7061 and 96-7062 (3d Cir. 1996) (Attached as Appendix B).

JURISDICTION

The District Court entered judgment in Plaintiff Carmela F. Durko's favor and awarded damages against both Defendant Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO, CLC, No. 243 and OI-NEG TV Products, Inc. on September 28, 1994. Timely appeal was taken by both Defendants to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the District Court's decision by Order on November 12, 1996. Pursuant to Supreme Court Rule 13.3, this Petition was filed within 90 days of the issuance of the order.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction was vested in the Court of Appeals pursuant to 28 U.S.C. § 1291. The District Court's jurisdiction was founded on 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981a, provides in part:

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 707 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of disparate impact) prohibited under section 703, 704, 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed under subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(b) Compensatory and punitive damages

(3) Limitations

The sum of the amount of compensatory damages awarded under this section . . . and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party --

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000;

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

STATEMENT OF THE CASE

A. The Parties and Procedural History.

Plaintiff Carmela Durko is an employee of Defendant OI-NEG TV Products, Inc. ("the Employer"), a company engaged in the business of manufacturing glass products for television sets. Durko was a member of Defendant Glass, Molders, Pottery, Plastics, & Allied Workers International Union, AFL-CIO, CLC, No. 243 ("Local 243" or "the Union"). Local 243 is the collective bargaining representative for employees employed at OI-NEG TV Products, Inc.

This matter arose upon a complaint filed by Plaintiff on August 17, 1993 in the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1331. Therein, Plaintiff alleged that she was subjected to discrimination based on her gender in violation of state and federal law[1] insofar as the Defendant

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[1] The First and Third Counts of the Complaint specifically alleged a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The Second and Fourth Counts of the Complaint alleged that the unlawful, discriminatory employment practices of the Employer and Local 243, which are alleged to be based upon gender, constituted a violation of Section 5A of the Pennsylvania Human Relations Act, 43 P.S. § 955(a).

Employer wrongfully removed her from her position as an assistant furnace operator and failed to grant her a right of recall to that position. Plaintiff further claimed that her Union, Local 243, discriminated against her insofar as they failed to pursue a grievance on her behalf in connection with this matter. At trial, the jury found for both the Union and the Employer on these claims.

Plaintiff further alleged that the Employer maintained a sexually hostile work environment and that Local 243 failed to process sexual harassment grievances on her behalf. It is only on these claims that the jury concluded that both the Employer and Local 243 were liable to Plaintiff and, as a result, awarded $50,000 in compensatory damages against the Employer, $50,000 in compensatory damages against the Union, and $25,000 in punitive damages against the Union. The Court entered judgment on September 28, 1994.

On October 13, 1994, Defendant Local 243 renewed an earlier motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b), and in the alternative, a motion for a new trial pursuant to Fed.R.Civ.P. 59. By Order entered December 31, 1995, the district court denied Local 243's Renewal Motion for Judgment as a Matter of Law Or, In the Alternative, For a New Trial, and entered final judgment in favor of Plaintiff.

B. Plaintiff's Sexual Harassment Claim.

Plaintiff was awarded damages at trial based on her allegation that during the time in which she was employed at OI-NEG she was subjected to a sexually hostile work environment, and that Local 243 failed to respond to her complaints concerning the harassment. Plaintiff's allegations of union malfeasance were vague and non-specific.

At the trial, Plaintiff was unable to identify any specific dates or times when she allegedly approached representatives of the Union to request that they intervene on

her behalf with respect to allegations of sexual harassment. J.A. 000565-566, 568; 001415, 001418, 001425, 001428-1429.[2] Rather, Plaintiff claimed that she made attempts to get one of her shop stewards, Joe Thompson, to file a grievance considering the alleged harassment from June 1991 until January 1993, and that she made requests at least once a week during the course of that time. Plaintiff further alleged that Mr. Thompson refused to listen to her and walked away from her while she chased him around the plant in an attempt to get his assistance in filing a grievance concerning the alleged harassment. J.A. 00565-566, 00571; 000667-670; 001415, 001418-1419, 001425, 001428-1429. Plaintiff failed to provide any corroborating testimony as to her alleged attempts to secure assistance from any shop stewards or other union representatives or corroboration as to the alleged instances of harassment.

The testimony of Local 243 representatives demonstrates that Plaintiff in no way meaningfully attempted to secure the assistance of the Union for the purpose of filing a grievance concerning sexual harassment. To the extent Plaintiff made any complaints concerning the harassing behavior that she was subjected to on the job, such complaints were vague, unspecific, and uncorroborated. Nevertheless, once the Union was apprised of Plaintiff's complaints, the Union conducted an investigation into the matter and determined that there was no support for Plaintiff's allegations.

According to the Union's Business Chairman Joe Lutecki, Plaintiff never requested that he file a grievance on her behalf concerning any subject and never complained to him about harassment on the job. J.A. 001195. Joe Thompson, a Union shop steward, testified that Plaintiff only

[2] As used herein, "J.A." refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit, which is available for review upon request.

requested his assistance in filing grievances concerning seniority, recall, and overtime, and that Plaintiff never complained to him about sexual harassment or mistreatment of any sort. J.A. 001283-1286. Moreover, Mr. Thompson never ran from Plaintiff when she approached him in the plant. Id. Finally, Mr. Lieback, also a Union shop steward, testified that Plaintiff never complained to him about any offensive or harassing conduct by fellow employees. J.A. 001146-1147.

Randy Robbins, another Union shop steward, testified that Plaintiff complained to him on one occasion about mistreatment and harassment on the job. J.A. 001250-001252, 001268-1269. Mr. Robbins responded by confronting the alleged harasser and also requested that Plaintiff provide the names of any witnesses to any alleged instances of harassment. Mr. Robbins testified that Plaintiff provided the name of one witness but thereafter indicated she was not interested in pursuing the matter because she did not want to jeopardize anyone's job. J.A. 001253-1255, 001268-1272. Mr. Robbins further testified that he advised Plaintiff that he was unable to file a grievance because he needed some corroboration, but that he nevertheless reported the allegations to Pete Moska, the Union President. J.A. 001255-1257. Mr. Robbins also testified at trial that the Union had in the past pursued a sexual harassment grievance on behalf of another female employee. J.A. 001258-1260.

Pete Moska did not receive reports from any shop stewards other than Randy Robbins concerning Plaintiff's complaints about alleged harassment. J.A. 001347. According to Mr. Moska, to the extent the Union received any information about Plaintiff's mistreatment on the job, the Union immediately responded by conducting its own investigation into the complaints and requesting that the personnel department also conduct an investigation. J.A. 001333-1335. During its investigation, the Union contacted several employees who had no information concerning alleged sexual harassment. J.A. 001336-1340. The matter was also

discussed at a Business Committee meeting and the shop steward responsible for the area had no information concerning the alleged harassment. J.A. 001340-1341. As a result of the Union's investigation, the Union determined that no other action was warranted. Id.

The trial testimony of Merlene Guntkowski, an employee who worked with Plaintiff in the Batch and Furnace Department, further corroborates the testimony of the Defendant Union's representatives. Ms. Guntkowski testified that she never experienced harassment of any kind during the time that she worked in that department. J.A. 001396-1398. According to Ms. Guntkowski, Plaintiff never complained to her about harassment, and she never complained to Plaintiff about harassment on the job. Id. Indeed, Ms. Guntkowski had no knowledge concerning Plaintiff's allegations of harassment by employees in the Department. Id.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE UNION COULD BE HELD LIABLE FOR PUNITIVE DAMAGES AS A MATTER OF LAW.

The case presents an issue of first impression for the United States Supreme Court -- whether a labor union can be held liable for punitive damages under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981a, or Section 5A of the Pennsylvania Human Relations Act, 43 P.S. §955, when sued in its capacity as an employee representative. In the present matter, the jury found the Defendant Union liable for punitive damages to Plaintiff, and the United States Court of Appeals for the Third Circuit upheld the verdict on review. Intervention by the United States Supreme Court is now required because Local 243, a labor union, cannot be held liable for punitive damages under either statute when

sued in its capacity as an employee representative. Petitioner respectfully submits that union liability for punitive damages in such circumstances does not comport with federal labor policy.

It is undisputed that prior to the above cited amendments to the Civil Rights Act in 1991, labor organizations could not be held liable for punitive damages under Title VII.[3] It is respectfully submitted that federal labor policy as demonstrated by the decision of this Court in International Brotherhood of Electrical Workers (IBEW) v. Foust, 442 U.S. 42 (1979) compels the conclusion that a labor union cannot be held liable for punitive damages as a matter of law in its capacity as employee representative, notwithstanding the 1991 Amendments to the Civil Rights Act of 1964. Moreover, the language contained in the 1991 Amendments and the legislative history reveal that Congress did not intend to subject labor unions to liability for punitive damages when it enacted the 1991 Amendments. Finally, federal court treatment of the liability of individual defendants under the 1991 Amendments is also instructive with respect to a labor union's liability for punitive damages under the 1991 Amendments.

A. The Jury's Verdict And The Decision Of The Court Of Appeals Conflict With Well-Established Principles of Federal Labor Policy.

This Court unequivocally established in International Brotherhood of Electrical Workers (IBEW) v. Foust, 442 U.S. 42 (1979), that punitive damages are not recoverable against a Union in suits for breach of a Union's duty of fair representation to its members. It is respectfully submitted that the duty of fair representation claim at issue in Foust, and the discrimination claim asserted by Plaintiff against the

[3] United States v. Burke, 504 U.S. 229, 238 (1992).

Defendant Union herein are analogous in both fact and law. Accordingly, the Court's decision in Foust is both instructive and controlling with respect to the Defendant Union's liability for punitive damages in the present action.

In Foust, an employee who had been discharged by his employer requested that his union file a grievance on his behalf. The union failed to timely file the grievance, and the employer denied the employee's claim of wrongful discharge on the basis of the union's non-compliance with the filing deadline. Thereafter, the employee filed suit against his union alleging that the union had breached its duty of fair representation owed to the employee-union member. The district court awarded the employee both compensatory and punitive damages, and the Tenth Circuit affirmed but remanded for consideration of whether the punitive damages award was excessive. This Court granted certiorari in order to determine whether holding a labor union liable for punitive damages comports with national labor policy. Foust, 442 U.S. at 43-46.

The Court determined that punitive damages are not recoverable against a union in suits for breach of a union's duty of fair representation to its members. In reaching this conclusion, this Court explained that such a limitation was proper in order to strike a necessary balance between the individual employee's right "to redress for injuries caused by union misconduct" with "the collective interests of union members in protecting limited funds." Id. at 50.

As the Foust Court succinctly stated, the danger of allowing punitive damages awards against labor unions is that such awards --

> could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a

price for whatever deterrent effect punitive damages may have.

Foust, 442 U.S. at 50-51.

This reasoning is equally persuasive in the present matter. Indeed, there is no difference between the purpose of breach of the duty of fair representation claims and Plaintiff's claims at issue in the present matter under Title VII of the Civil Rights Act and the Pennsylvania Human Relations Act. Both types of suits have as their goal the prevention and/or remedy of improper union conduct in the representation of member-employees. There is no basis for arguing that the rights of a union member under Title VII and/or the Pennsylvania Human Relations Act are different or somehow more important than a member's right to be fairly represented by a union. Indeed, a union member's right to be free from discriminatory treatment within a union is the essence of a union's duty of fair representation. Vaca v. Sipes, 386 U.S. 171 (1967). Proper union representation lies at the heart of the entire statutory scheme of federal labor policy.

B. In Enacting The 1991 Amendments To The Civil Rights Act, Congress Did Not Intend To Make Labor Unions Liable For Punitive Damages.

A review of the language used in, as well as the legislative history behind, the 1991 Amendments to Title VII reveals no more argument for the allowance of punitive damages against a labor union under Title VII than in suits for breach of the duty of fair representation. Rather, they direct the conclusion that labor unions were not intended to be held liable for punitive damages.

The amendments to Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 1981a, which allow a complaining party to recover compensatory and punitive damages in a Title VII action, expressly limit the amount of damages recoverable

against a respondent on the basis of the number of employees employed by the respondent. This provision strongly suggests that the provision allowing the assessment of punitive damages was only to apply to employers, since labor organizations are not typically measured by the number of individuals that they employ. Cf. Sheridan v. E.I. duPont de Nemours and Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996) (the fact that the limitation provision "made no reference as to the amount of damages, if any, that would be payable by individuals . . . strongly suggests that Congress did not contemplate that such damages would be assessed against individuals who are not themselves the employing entity").[4]

The legislative history concerning the enactment of the amendments is also instructive with respect to the applicability of the Civil Rights Act, as amended, to labor organizations. In addressing the need for damages, this history provides:

> Monetary damages simply raise the cost of an employer's engaging in intentional discrimination thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens. (emphasis added)

House Report No. 102-40(I).

The legislative history continues:

> All too frequently, Title VII leaves prevailing plaintiffs without remedies for their injuries and allows employers who discriminate to avoid

[4] In the alternative, even if the 1991 amendments were meant to apply to labor organizations, Local 243 cannot be held liable for punitive damages under Title VII of the 1964 Civil Rights Act 42 U.S.C §2000e et seq., as amended, 42 U.S.C. §1981a(b) in the absence of evidence that it employs any employees as required by the limitation provision. See infra at IV.

any meaningful liability. (emphasis added)

Id.

Notably, in a discussion concerning the important deterrent effect of monetary damages, the legislative history concludes:

> Making employers liable for all losses -- economic and otherwise -- which are incurred as a consequence of prohibited discrimination, and which are proved at trial, will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole. (citations omitted) (emphasis added)

Id.

Finally, in a discussion responding to concern over disproportionate jury awards, the legislative history provides:

> . . . Strict standards limit the recovery of damages by plaintiffs with meritorious claims. Plaintiffs must first prove intentional discrimination, they must prove actual injury or loss arising therefrom to recover compensatory damages, and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages. (emphasis added)

Id.

Noticeably absent from the legislative history is ***any*** discussion of labor unions as the target of the amendments. In contrast, the legislative history repeatedly identifies the purpose of the amendments as the need to deter ***employers,***

not labor unions, from engaging in intentional discrimination.

C. The Refusal Of Most Courts To Hold Individuals Liable for Punitive Damages Is Instructive In The Instant Case.

Many courts have addressed the meaning and intent of the 1991 amendments allowing for punitive and compensatory damages in the context of determining whether a complaining party can recover such damages against an individual employee. Importantly, a majority of these courts have refused to impose liability for compensatory or punitive damages upon an individual employee under Title VII in light of the 1991 Amendments since Congress did not expressly provide for such liability. The courts recognize that Congress, by tying the availability of both compensatory and punitive damages to the number of employees employed, revealed its intent not to impose liability on those unable to afford it.

The Ninth Circuit was one of the first courts to address this issue and conclude that, in light of the 1991 Amendments, individuals cannot be held liable for compensatory or punitive damages under Title VII. In Miller v. Maxwell's International, Inc.,[5] a former employee brought a sex discrimination claim pursuant to Title VII against her employer and individual employees. The court reasoned that the 1991 Amendments allowing, and limiting, recovery of punitive and compensatory damages displayed Congressional intent to exclude individuals from such liability. 991 F.2d at 587-588, fn. 2. The court noted that the amendments specifically limit the amount of damages available depending upon the size of the employer. Id. The Miller court concluded that if Congress had intended to impose individual liability under Title VII for compensatory or punitive damages, or liability on any respondent other than an employer, it expressly would have done so in the "litany of

[5] 991 F.2d 583 (9th Cir. 1993), cert. denied, 510 U.S. 1109 (1994).

limitations and would have discontinued the exemption for small employers. . ." Id.

Since then, many Circuits have adopted the Ninth Circuit's reasoning in Miller, and have refused to hold individuals liable for punitive and compensatory damages under Title VII and other federal employment discrimination statutes. See e.g., Sheridan v. E.I. duPont de Nemours, 100 F.3d 1061, 1077 (3d Cir. 1996) (noting that "the clear majority of the courts of appeals that have considered this question have held that individual employees cannot be held liable under Title VII"); Tomka v. Seiler Corp., 66 F.3d 1295 (2nd Cir. 1995); Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995); U.S. E.E.O.C. v. AIC Security Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995); Birkbeck v. Marvel Lighting Corporation, 30 F.3d 507 (4th Cir.), cert. denied, 130 L.Ed.2d 600 (1994); and Grant v. Lone Star Co., 21 F.3d 649 (5th Cir.), cert. denied, 130 L.Ed.2d 491 (1994).[6]

The reasoning in these cases applies with equal force in the present situation with respect to whether Local 243 can be held liable for punitive damages under Title VII. Like small employers and individual employees, labor unions, in general, and local unions in particular, tend to have limited resources.[7] In this case, a review of the evidence presented concerning Local 243's net worth reveals that the total

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[6] In addition, district courts which have addressed the issue have overwhelmingly found no individual liability under Title VII, based on the reasoning set forth in Miller. See e.g., Tyson v. Cigna Corp., 918 F.Supp. 836 (D.N.J. 1996); Miller v. CBC Companies, Inc., 908 F.Supp. 1054 (D.N.H. 1995); Caldwell v. Federal Express Corporation, 908 F.Supp. 29 (D.Me. 1995); Frizzell v. Southwest Motor Freight, Inc., 906 F.Supp. 441 (E.D.Tenn. 1995); Winston v. Hardee's Food Systems, Inc., 903 F.Supp. 1151 (W.D.Ky. 1995); Hardwick v. Curtis Trailers, Inc., 896 F.Supp. 1037 (D.Or. 1995); Verde v. City of Philadelphia, 862 F.Supp. 1329 (E.D.Pa. 1994).

[7] See Foust, 442 U.S. at 50-51 (allowing punitive damages awards against labor unions could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents).

judgment against Local 243, including punitive and compensatory damages, constitutes more than 79% of Local 243's net worth. J.A. 000303-314; 000782-785. The financial liability imposed on Local 243 by the jury's award would thus cripple the Union and swallow its treasury. This is precisely the type of result that Congress intended to avoid in creating the current statutory scheme which ties the availability of both punitive and compensatory damages to the number of employees employed by a respondent employer. If, in passing the Civil Rights Act of 1991, Congress had intended to make punitive damages available against labor unions, it would have explicitly done so, as it did with employers.

D. Plaintiff is not Entitled to Punitive Damages under the Pennsylvania Human Relations Act.

Although the Supreme Court of Pennsylvania has yet to rule directly on the availability of punitive damages under the Pennsylvania Human Relations Act ("PHRA"), several federal district courts have held that such damages are not available. See e.g., Knight v. Albert Einstein Medical Center, 748 F.Supp. 280 (E.D.Pa.1990); Hannah v. Philadelphia Coca-Cola Bottling Co., 53 FEP 9 (E.D.Pa. 1989).[8] Moreover, courts within the Third Circuit have consistently recognized that the PHRA should be interpreted in accord with Title VII and other federal anti-discrimination statutes. See e.g., Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996); Clarke v. Whitney, 907 F.Supp. 893 (E.D.Pa. 1995); Barb v. Miles, Inc., 861 F.Supp. 356 (W.D.Pa. 1994); Clark v. Commonwealth of Pennsylvania, 885 F.Supp. 694 (E.D.Pa.1995); and Violanti v. Emery Worldwide, 847 F.Supp. 1251 (M.D.Pa. 1994). The District Court and Court of Appeals therefore erred in allowing Plaintiff to recover

[8] But see, Doe v. William Shapiro, Esquire, P.C., 852 F.Supp. 1246 (E.D.Pa. 1994).

punitive damages under the PHRA, as well as Title VII.

II. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE MATERIAL EVIDENCE WAS ERRONEOUSLY EXCLUDED.

Petitioner respectfully submits that this case presents an important evidentiary issue concerning the admissibility of a federal agency's written determinations. In the present matter, the District Court refused to admit into evidence written determinations of the National Labor Relations Board. These determinations were in response to Plaintiff's charges of the Union's alleged discriminatory failure to process grievances on Plaintiff's behalf. As discussed infra, the District's Court's refusal to admit the NLRB determinations into evidence, or to permit reference to the determinations in any manner, conflicts with the conclusions reached by numerous federal courts in other jurisdictions.

Far from being a minor item, the evidence excluded was intended to impeach Plaintiff's credibility on the issue of the Union's alleged discriminatory failure to process grievances on Plaintiff's behalf -- the very essence of Plaintiff's claims against the Union in the present matter. The evidence excluded stands for the proposition that the National Labor Relations Board determined that Local 243 did not discriminate against Plaintiff in its handling and processing of her grievances. Such evidence went directly to Plaintiff's credibility, a key issue in this case. The question of the fairness of the trial rested on the jury's choice of testimony between Plaintiff on one hand, or the Union witnesses on the other. Defendant Local 243 was not allowed to attack Plaintiff's credibility with a determination made by the NLRB which contradicted Plaintiff's testimony that the Local 243 discriminatorily failed to process grievances on her behalf.

Prior to instituting this suit, Plaintiff filed charges with the Fourth Region of the NLRB against Local 243. The allegations of those charges related both to Local 243's

resolution of a seniority dispute concerning the relative seniority rights of Plaintiff and Walter Snopeck, and Plaintiff's lack of recall rights to the job of assistant furnace operator. The Region refused to issue a Complaint against Local 243 concerning either charge, and the Board upheld this position in separate appeals.

A district court within the Third Circuit has addressed the question of the admissibility of written determinations of the National Labor Relations Board, and has concluded that such determinations are to be given considerable evidentiary weight. In Arnold v. United Association of Journeymen, 388 F.Supp. 1105 (W.D. Pa. 1975), aff'd. 529 F.2d 511 (3rd Cir. 1975), the Court held:

> While this [refusal of the NLRB to issue a Complaint] does not amount to res judicata, such findings are entitled to be given considerable evidentiary weight. 388 F.Supp. at 1107.

The Arnold court relied upon the Fifth Circuit's reasoning in Smith v. Local 25, Sheet Metal Workers International, 500 F.2d 741 (5th Cir. 1974). There, the Fifth Circuit concluded:

> . . . [N]o res judicata or collateral estoppel effect attaches to the refusal [by the NLRB to issue a complaint] for purposes of bringing suit in the federal courts (citations omitted). This does not mean, however, that express findings in a refusal to issue a complaint are to be ignored. . . . 500 F.2d 748 n.4.

In fact, at least two district courts have afforded even more deference to the written determinations of the NLRB. These courts have gone so far as to construe the refusal of the Board to issue a charge against a union for breach of its duty of fair representation as res judicata for any future § 301

action. Baker v. Detroit Riverview Hospital, 834 F.Supp. 216 (E.D. Mi. 1993), aff'd, 57 F.3d 1069 (6th Cir. 1995); Rudolph v. Wagner Electric Corp., 80 LRRM 2937 (E.D. Mo. 1972).

Although this is not the recognized rule in the Fourth Circuit, Thomas v. Consolidated Coal Co., 380 F.2d 69 (4th Cir.), cert. denied, 389 U.S. 1004 (1967), the Court did emphasize the evidential value of written determinations of the National Labor Relations Board. Therein, the Court opined:

> Though a refusal of the National Labor Relations Board to issue a complaint does not constitute an adjudication for purposes of applying the doctrine of res judicata in a subsequent court action under Section 301, the series of charges filed by plaintiffs with the Board and the failure of the Board to issue any complaint in connection with those charges in this instance serve to highlight the opportunities which have been available to plaintiffs to have their grievances authoritatively adjudicated.

380 F.2d at 77-79.[9]

Although the authorities are split concerning whether NLRB determinations which find merit in § 8(b)(1) charges alleging a breach of the duty of fair representation may constitute res judicata, there is almost no support for the proposition that such evidence is totally inadmissible. As the Arnold court held, the determination of the NLRB is to be

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[9] Similarly, in ruling on summary judgment motions, the NLRB determination not to issue a complaint should be given "substantial weight." Helmer v. Briody, 747 F.Supp. 1020, 1026 (S.D.N.Y. 1990) (quoting Berard v. General Motors Corp., 493 F.Supp. 1035, 1040 (D.Mass.), aff'd, 657 F.2d 261 (1st Cir. 1980), cert. denied, 451 U.S. 987 (1981)). Accord Boudreaux v. Vulcan Materials Co., 485 F.Supp. 347, 351 (E.D.Wis. 1980) (The NLRB finding "tends to underscore the onus that [the plaintiff] has of showing the existence of a genuine dispute of material fact").

given "considerable evidential weight" by the district court.

Accordingly, the District Court erred in failing to allow Local 243 to admit the written determinations of the NLRB into evidence and otherwise refer to Plaintiff's failed attempts to litigate issues before the National Labor Relations Board. In two separate charges filed with the Board, Plaintiff alleged that the Defendant's handling of the dispute and processing of the grievances was motivated by gender discrimination. However, in rejecting both of Plaintiff's charges, the National Labor Relations Board's Philadelphia Regional Director made a finding that there was no evidence of discriminatory motive. Thus, Plaintiff's claims of gender discrimination were considered and rejected by the National Labor Relations Board in ruling on Plaintiff's charges that the Union breached its duty of representation towards her.

The exclusion of such evidence was prejudicial insofar as Defendant Local 243 intended to introduce the determinations as evidence that the Union did not discriminate against Plaintiff on account of her gender with respect to its processing and handling of grievances. This is the very essence of Plaintiff's claim against Local 243 with respect to that part of her complaint which relates to the Union's responsibility and liability for an alleged sexually hostile work environment -- the only claim upon which Plaintiff prevailed against the Union. Plaintiff claims that Local 243 discriminated against her on account of gender by failing to process her alleged grievances concerning sexual harassment.

As discussed in more detail below,[10] not only did Plaintiff completely fail to provide any specificity concerning the alleged occasions on which she complained to Local 243 representatives of sexual harassment, but Plaintiff also completely failed to present evidence that Local 243 discriminated against her in failing to process grievances on

[10] See infra at III.

her behalf concerning alleged harassment and that Local 243's handling and processing of grievances was motivated by gender discrimination. The Union presented testimony that at least one of the Union's shop stewards had pursued grievances concerning sexual harassment on behalf of another female employee. Accordingly, the Defendant's inability to introduce Plaintiff's failed attempts to litigate these very same issues before the National Labor Relations Board into evidence and argue to the jury the consequences of those determinations constitutes a prejudicial error warranting a new trial.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S DETERMINATION THAT THE UNION DISCRIMINATORILY FAILED TO PURSUE SEXUAL HARASSMENT GRIEVANCES ON BEHALF OF PLAINTIFF.

Plaintiff's failure to state with specificity the occasions on which Plaintiff allegedly lodged complaints with the Union concerning incidents of sexual harassment and the Union's alleged failure to respond to Plaintiff's complaint, coupled with the utter vagueness of the Complaint on this subject, J.A. 000024, is fatal to her claim concerning the Union's alleged discriminatory failure to process sexual harassment grievances. Plaintiff was required to give Local 243 reasonable notice of the time and nature of her attempted involvement of Local 243 in the grievance process so that Local 243 could adequately defend itself against allegations of discriminatory failure to process sexual harassment grievance on her behalf. Conclusory allegations of mishandled grievances, without providing specificity, leads to the conclusion that the claims are frivolous, and ultimately should lead to the dismissal of those claims. Frazier v. Southeastern Pennsylvania Transportation Authority, 785 F.2d 65 (3d Cir. 1986).

The import of the specificity requirement cannot be understated. Specificity is needed in order to afford a defendant adequate notice to frame an answer and defense.

See Frazier, 785 F.2d at 68. Without such notice, a defendant is effectively denied its due process rights. Frazier, 785 F.2d at 67, 69-70.

Here, Plaintiff's testimony concerning the Union's failure to respond to her grievances concerning sexual harassment were so vague and non-specific so as not to afford the Union an adequate opportunity to respond. The evidence of record establishes that Plaintiff was unable to identify any specific dates or times when she allegedly approached representatives of the Union to request that they intervene on her behalf with respect to allegations of sexual harassment. J.A. 000565-566, 568; 001415, 001418, 001425, 001428-1429. Rather, Plaintiff merely testified that she made attempts to get one of her shop stewards, Joe Thompson, to file a grievance considering the alleged harassment from June 1991 until January 1993 and that she made requests at least once a week during the course of that time. Plaintiff further testified that Mr. Thompson refused to listen to her and walked away from her while she chased him around the plant in an attempt to get his assistance in filing a grievance concerning alleged harassment. J.A. 00565-566, 00571; 000667-670; 001415, 001418-1419, 001425, 001428-1429. This is the most specificity that Plaintiff provided concerning the Union's alleged failure to process grievances on her behalf concerning alleged harassment. Plaintiff failed to provide any corroborating testimony as to her alleged attempts to secure assistance from any shop stewards or other union representatives or corroboration as to the alleged instances of harassment.

On the other hand, Local 243 presented substantial evidence that Plaintiff never attempted to secure the assistance of the Union for the purpose of filing a grievance concerning sexual harassment and that, to the extent Plaintiff made any complaints concerning harassing behavior that she was subjected to on the job, such complaints were vague, unspecific, and uncorroborated. Moreover, once the Union was apprised of Plaintiff's complaints, notwithstanding their

vague and non-specific nature, the Union conducted an investigation into the matter and determined that there was no support for Plaintiff's allegations. Plaintiff actually impeded this investigation for although she, at the Union's request, initially supplied the name of one witness, thereafter she advised the Union that she was not interested in pursuing the matter because she did not want to jeopardize anyone's job.[11]

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[11] As stated previously, Union Official Joe Lutecki testified that the Plaintiff never requested that he file a grievance on her behalf concerning any subject, and never complained to him about harassment on the job. J.A. 001195. Joe Thompson, a Union shop steward, testified that the Plaintiff only requested his assistance in filing grievances concerning seniority, recall, and overtime, and that the Plaintiff never complained to him about sexual harassment or mistreatment of any sort. J.A. 001283-1286. Moreover, Mr. Thompson testified that he never ran from the Plaintiff when the Plaintiff approached him in the plant. Id. Finally, Mr. Lieback, also a Union shop steward, testified that Plaintiff never complained to him about any offensive or harassing conduct by fellow employees. J.A. 001146-1147.

Randy Robbins, another Union shop steward, testified that the Plaintiff complained to him on one occasion about mistreatment and harassment on the job. J.A. 001250-001252, 001268-1269. Mr. Robbins responded by confronting the alleged harasser and also requested that the Plaintiff provide the names of any witnesses to the alleged instances of harassment. Mr. Robbins testified that Plaintiff provided the name of one witness but thereafter indicated she was not interested in pursuing the matter because she did not want to jeopardize anyone's job. J.A. 001253-1255, 001268-1272. Mr. Robbins further testified that he advised the Plaintiff he was unable to file a grievance because he needed some corroboration, and reported the allegations to Pete Moska, the Union President. J.A. 001255-1257.

Pete Moska, testified that he did not receive reports from any shop stewards besides Randy Robbins that the Plaintiff complained about alleged harassment. J.A. 001347. Mr. Moska further testified that the Plaintiff complained to him about mistreatment on the job, and that the Union immediately responded by conducting its own investigation into the complaints and requesting that the personnel department also conduct an investigation. J.A. 001333-1335. During its investigation, the Union contacted several employees who had no information concerning alleged sexual harassment. J.A. 001336-1340. The matter was also discussed at a Business Committee meeting and the shop steward responsible for the area had no information concerning the alleged harassment. J.A. 001340-1341. Mr. Moska testified that as a result of the Union's

Further, Plaintiff failed to present any evidence that the Union discriminatorily failed to process sexual harassment grievances on the basis of her gender. Plaintiff presented no evidence that the Union processed grievances of male employees concerning harassment or that the Union consistently failed to process the sexual harassment grievances of other female employees in the bargaining unit. Rather, the record establishes that one of the Union's shop stewards, Randy Robbins, pursued a sexual harassment grievance on behalf of another female employee, during the time that he served as a shop steward for the Union. J.A. 001258-1260.[12]

In light of the above, it is respectfully submitted that there was insufficient evidence to support the jury's determination. Cassidy Podell Lynch, Inc. v. Snydergeneral Corp., 944 F.2d 1131 (3d Cir. 1991). Accordingly, the Court

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investigation, the Union determined that no other action was warranted. Id.

Finally, Merlene Guntkowski, an employee who worked with the Plaintiff in the Batch and Furnace Department, testified that she never experienced harassment of any kind during the time that she worked in that department. J.A. 001396-1398. Ms. Guntkowski further testified that the Plaintiff never complained to her about harassment, and that she never complained to the plaintiff about harassment on the job. Id. Ms. Guntkowski testified that she had absolutely no information concerning Plaintiff's allegations of harassment by employees in the Batch and Furnace Department. Id. This testimony was critical because Plaintiff initially identified Ms. Guntkowski as someone who had information concerning Plaintiff's allegations of harassment.

[12] The United States Supreme Court's decision in Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), demonstrates how the evidence in the present matter is insufficient to support the jury's determination that the union discriminatorily failed to pursue sexual harassment grievances on behalf of the Plaintiff. In Goodman, the Court concluded that a union which intentionally avoids asserting discrimination claims can be liable under Title VII. However, in that case, unlike here, the black union members established that the union had ignored grievances based on instances of harassment which were indisputably racial in nature and that the union had regularly refused to include assertions of racial discrimination in grievances that also asserted contract violations.

of Appeals erred in affirming the District Court's finding that there was sufficient evidence to support the jury's determination that the Union discriminatorily failed to process grievances on Plaintiff's behalf concerning allegations of sexual harassment.

IV. THE EVIDENCE FAILS TO SUPPORT PUNITIVE DAMAGES, OR ALTERNATIVELY, THE PUNITIVE DAMAGES AWARDED AGAINST THE DEFENDANT UNION WERE SO EXCESSIVE AS TO REQUIRE A REMITTITUR.

Whether it was within the province of the jury to award punitive damages here under Title VII and/or the Pennsylvania Human Relations Act or not, the district court nevertheless erred by refusing to grant a remittitur because of the excessive nature of the award. Courts of Appeals share with the district courts an obligation to insure that a particular award is not greater than reasonably necessary to punish and deter. Dunn v. Hovic, 1 F.3d 1371, 1385 (3d Cir. 1993). When both courts fail to meet this obligation, as they did here, the Supreme Court should intervene.

Generally speaking, in determining what is a proper level of punitive damages, the courts look to such factors as the defendant's wealth, its conduct, the extent of the harm, the multiplicity of claims and the award of punitive damages in similar cases. Id. at 1391.[13] The courts have further observed that the granting of punitive damage is rare, and that such awards are frequently reduced on appeal. Id. at 1390. For example, in an analogous context, those circuits which have approved punitive damages in Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 et seq., ("LMRDA") cases have further cautioned that "[s]uch punishment should be imposed only in the most egregious cases . . ." and -

[13] See also, Restatement of Torts (Second) §908, cmt. e.

> the amount of any such award must not be so great as to cripple the union financially and detract significantly from the ability to represent its members. The trial judge should be prepared to reduce any award that fails to reflect sufficient consideration of these factors.

Quinn v. DiGiulian, 739 F.2d 637, 651 (D.C. Cir. 1984); Petramale v. Laborers Local 17, 847 F.2d 1009, 1013 (2d Cir. 1988).

The jury's conclusion with respect to Local 243's liability for punitive damages is simply unsupported by the facts. First, the 1991 Amendments allow a complaining party to recover punitive damages against a respondent only "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[14]

Similarly, even those cases permitting the recovery of punitive damages under the PHRA require proof that the defendant knowingly and maliciously deprived a plaintiff of his or her civil rights. Doe v. William Shapiro, Esquire P.C., 852 F.Supp. 1246 (E.D.Pa. 1994); Rogers v. Mount Union Borough By Zook, 816 F.Supp. 308 (M.D.Pa. 1993). Because there is absolutely no evidence that the Union exhibited malice or reckless indifference to Plaintiff's civil rights, the award of punitive damages against Local 243 cannot stand as a matter of law.

In the present matter, the record is completely devoid of any evidence that Local 243 acted with the requisite malicious intent or reckless indifference in allegedly failing to process Plaintiff's purported grievances concerning sexual harassment. Rather, as discussed supra, the evidence

[14] 42 U.S.C. §1981a(b)(1).

establishes that to the extent Plaintiff made any complaints concerning harassing behavior she was subjected to on the job, such complaints were vague, unspecific, and uncorroborated. Significantly, once the Union was apprised of Plaintiff's complaints, the Union conducted an investigation into the matter and determined that there was no support for Plaintiff's allegations. It can hardly be considered malicious, oppressive, or reckless for the Union to conduct an investigation into the matter once becoming apprised of Plaintiff's allegations, especially in light of the vague and non-specific nature of Plaintiff's complaints.

Second, Plaintiff's own testimony completely undermines the jury's conclusion concerning Local 243's liability for punitive damages. Plaintiff testified without corroboration and without any specificity that she allegedly tried to get Mr. Thompson to file a grievance on her behalf. Plaintiff further testified that Mr. Thompson refused to listen to her and walked away from her while she chased him through the plant. However, Plaintiff also testified that it is possible that Mr. Thompson did not hear her due to the noise in the plant. If that is the case, Mr. Thompson's failure to respond hardly rises to the level of malicious intent or reckless indifference needed to establish liability for punitive damages.

Third, the excessive nature of the punitive damages award in the present matter is easily demonstrated by comparing it to other cases involving union misconduct. In Petramale, supra, the plaintiff union member, was disciplined for making slanderous accusations against union officials and for disrupting a union meeting. The jury awarded $200,000 in compensatory damages and $50,000 in punitive damages against the union, as well as $5,000 in punitive damages against each of three union officers. Id. at 1012. On appeal, the Second Circuit found the punitive damage award against

the union excessive and ordered a remittitur to $10,000.[15]

Finally, as alluded to above, the recent amendments to Title VII of the Civil Rights Act of 1964 allowing for recovery of punitive and compensatory damages expressly tie the availability of both compensatory and punitive damages to the number of employees of a company. In addition, courts have consistently recognized that the framework of the statutory amendment reveals that Congress did not intend to impose such liability on those unable to afford it. Accordingly, courts have refused to impose liability for punitive damages on individual supervisors or individual employees who are likely to have far more limited resources that the employer itself.

Since unions in general, and local unions in particular tend to have limited resources, the same reasoning applies with equal force in the present situation. See Foust, 442 U.S. at 50-51. As discussed supra, the financial liability imposed on Local 243 by the jury's award would obliterate the Union's treasury, thereby undermining the Union's ability to represent its members effectively. This is precisely the type of result that Congress intended to avoid in creating a statutory scheme which ties the availability of both punitive and compensatory damages to the number of employees employed by a respondent Employer. Further, here, no evidence was

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[15] See also Quinn, 739 F.2d at 652 (Court of Appeals upheld a punitive damage award of $3,000 against the union for intimidating, harassing, coercing, threatening and discriminating against the plaintiff because of his candidacy in an election, and by refusing the plaintiff's dues, suspending him for allegedly failing to pay his dues, and instructing members of the local not to work on any jobs with him); Maxwell v. UAW Local 1306, 489 F.Supp. 745, 753 (C.D. Ill. 1980) (District Court found that the union improperly violated plaintiffs' free speech rights, but awarded punitive damages of only $500 to each plaintiff, to be paid by defendants jointly); Keene v. Operating Engineers Local 624, 569 F.2d 1375, 1382 (1st Cir. 1978) (jury awarded $37,500 in punitive damages against the union for retaliating against a member for supporting an opposition slate, but the district court remitted the punitive damages to $15,000 and Court of Appeals affirmed).

presented as to the Union's annual operating expenses, whether any of its assets were committed for other necessary Union business, or whether there was indeed a surplus or excess of any kind over liabilities. Since an award of punitive damages against a union under the LMRDA cannot stand if it would "cripple the union financially and detract significantly from the ability to represent its members," Quinn, the evidence in the present matter fails to support any award of punitive damages.

Accordingly, in light of the evidence presented, the conclusion of the jury is simply unsupported by the facts, and therefore the punitive damages award against Local 243 must be set aside and/or remitted.

CONCLUSION

This Court should use its supervisory powers to determine whether holding a labor union liable for punitive damages under Title VII and the Pennsylvania Human Relations Act comports with national labor policy. This Court should further use its supervisory powers to determine the appropriate evidentiary weight to be afforded written determinations of the National Labor Relations Board. Petitioner asks that this Court grant *certiorari* in this case.

Respectfully Submitted

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APPENDICES

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARMELA P. DURKO,	:	
	:	**No. 4:CV-93-1284**
Plaintiff	:	
	:	**(JUDGE VANASKIE)**
v.	:	
	:	
OI-NEG TV	:	**FILED**
PRODUCTS, INC., AND	:	**SCRANTON**
GLASS, MOLDERS,	:	**DECEMBER 31, 1995**
POTTERY, PLASTICS	:	**PER DEPUTY**
CLERK		
& ALLIED WORKERS	:	
INTERNATIONAL	:	
UNION AFL-CIO, CLC	:	
No. 243,	:	
	:	
Defendants	:	

MEMORANDUM

Presently pending before this Court is the post-trial motion filed by defendant, Glass, Molders, Pottery, Plastics and Allied Workers International Union AFL-CIO, CLC No. 243 (hereinafter referred to as the "Union"), in connection with the sexual harassment claim of plaintiff Carmela F. Durko. Pursuant to Rule 50 of the Federal Rules of Civil Procedure, the Union has renewed its Motion for Judgment as a Matter of Law. In the alternative, it seeks a new trial under Fed.R.Civ.P. 59, or a remittitur. The Union asserts various theories in support of its motion. For the following reasons this Motion will be denied.

I. BACKGROUND

On August 17, 1993, plaintiff Carmela F. Durko commenced this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C.S.A. §§951 et. seq. Durko named as defendants her employer, OI-NEG TV Products, Inc., (hereinafter referred to as the "Employer"), and her collective bargaining representative, the defendant Union. With respect to the Union, Durko alleged, inter alia, that it discriminatorily failed to pursue hostile work environment grievances on her behalf.

Summary judgment motions separately pursued by each defendant were denied by Memoranda and orders filed on September 15 and 16, 1994. A jury trial was conducted from September 20, 1994, to September 26, 1994.[1] The jury found that, with respect to the Employer, Durko proved by a preponderance of the evidence that she was subjected to sexual harassment. The jury also found that her Employer was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action. Durko was awarded compensatory damages from the Employer in the amount of $50,000. (Dkt. Entry # 72.)

With respect to the Union, the jury found that Durko proved by a preponderance of the evidence that the Union discriminatorily failed to pursue sexual harassment grievances on her behalf. The jury awarded Durko $50,000 in compensatory damages and $25,000 in punitive damages from

[1]At the close of the presentation of the plaintiff's case in chief and at the close of all the evidence, both defendants moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. After deferring ruling on those motions and submitting the matter to the jury on special verdict interrogatories, this Court denied defendants' aforementioned motions. (Dkt. Entry i 76.)

the Union. Id. Judgment was entered on the verdict on September 28, 1994.[2] (Dkt. Entry # 79.)

II. DISCUSSION

A. Standard of Review

A motion for judgment as a matter of law should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability. Wittekamp v. Gulf & W. Inc, 991 F.2d 1137, 1141 (3rd Cir.), cert. denied, 114 S.Ct. 309 (1993); Bille v. CIGNA Corn., 940 F.2d 812, 815 (3rd Cir. 1991). In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witness or substitute its version of the facts for the jury's version. Fineman v. Armstrong World Indus., 980 F.2d 171, 190 (3rd Cir. 1992), cert. denied, 113 S.Ct. 1285 (1993). Although judgment a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability. Walter v. Holiday Inns, Inc., 985 F.2d 1232, 1238 (3rd Cir. 1993). "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party. Patzig v. O'Neil, 577 F.2d 841, 846 (3rd Cir. 1978) (citation omitted;quotation omitted).

It is well-settled that a court can grant a new trial if the verdict was against the weight of the evidence. Shanno v. Magee Industrial Enterprises, Inc., 856 F.2d 562, 567 (3rd Cir. 1988). However, a jury's verdict should not be lightly

[2]The jury found in favor of both defendants with respect to Durko's claims that each defendant had discriminated against her with respect to her efforts to secure the position of assistant furnace operator.

overturned on the ground that the verdict was against the weight of the evidence. See Williamson v. Conrail, 926 F.2d 1334, 1348 (3rd Cir. 1991). A new trial is generally warranted only when the trial judge is satisfied there has been a miscarriage of justice. This standard has evolved so as "to ensure that a district court does not substitute its 'judgment of the facts and the credibility of the witnesses for that of the jury.'" Fineman, 980 F.2d at 211. In reaching its determination, the court must view all evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict. Marino v. Ballestas, 749 F.2d 162, 167 (3rd Cir. 1984).

B. The Union's Liability For Failing To Pursue Grievances Of A Sexually Hostile Work Environment

The Union first contends that the issue of its potential liability for the maintenance of a sexually hostile work environment should not have gone to the jury. It asserts that, as a matter of law, the absence of a respondeat superior relationship between the Union and its members mandates that the Union not be held liable for the maintenance of a sexually hostile work environment. See Union's Br. (Dkt. Entry # 90) at 7. Contending that the Employer bears the responsibility for taking appropriate action in response to complaints of sexual harassment, and noting that under the Collective Bargaining Agreement the Employer has the exclusive right to discipline employees and supervise the work environment,[3] the Union asserts that neither the Collective Bargaining

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[3]Article 8 of the Collective Bargaining Agreement, in pertinent part, provides:

> The Union recognizes the right and responsibility of the Company to manage its plant and to direct its working forces. All rights of the Company which have not been specifically abridged or modified by this Contract are retained by the Company.

Agreement nor the law provide any basis for holding the Union liable on Plaintiff's claim in the instant case. Id. at 10.

The unsound premise for the Union's argument is that it was found liable for permitting a hostile work environment to exist. Contrary to the Union's assertion, liability was imposed for its discriminatory refusal to process grievances of sexual harassment. (See the Jury's Response to Special Verdict Question No. 6 (Dkt. Entry 72).)[4]

Apparently, it is the Union's position that it owes no obligation to pursue a woman member's sexual harassment claim if the harasser is a male member of the Union. As I explained in denying the Union's summary judgment motion, this position is untenable. In Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), the United Steelworkers of America and two of its local unions argued that they could not be held liable under Title VII for failure to pursue racial discrimination grievances on behalf of black union members. The facts revealed:

> that since 1965, the collective-bargaining contract contained an express clause binding both the employer and the Unions not to discriminate on racial grounds; that the employer was discriminating against blacks in discharging probationary employees, which the Unions were aware of but refused to do anything about by way of filing proffered grievances or otherwise; that the Unions had ignored

[4]Special Verdict Question No. 6 asked:

> Has Plaintiff proved by a preponderance of the evidence that (a) she was subjected to hostile work environment sexual harassment, and (b) the Union discriminatorily failed to pursue sexual harassment grievances on behalf of Plaintiff? (Emphasis added.]

> grievances based on instances of harassment which were indisputably racial in nature; and that the Unions had regularly refused to include assertions of racial discrimination in grievances that also asserted other contract violations. Goodman, 482 U.S. at 666.

In affirming the judgment against the unions on the basis of these facts, the Court endorsed the following proposition:

> A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its (male] membership, is liable under . . . Title (VII] . . . . Id. at 669.

In language particularly apropos here, the Court concluded:

> [Title VII does] not permit a union to refuse to file any and all grievances presented by a [woman] on the ground that the employer looks with disfavor on and resents such grievances. It is no less violative of these laws for a union to pursue a policy of rejecting [sexual harassment] grievances presented by [women] solely because the claims assert [sexual] bias and would be very troublesome to process. Id. [emphasis added].

As in Goodman. the Collective Bargaining Agreement in this case specifically provides:

> There shall be no discrimination by either the Company or the Union against any employee because of . . . sex in the administration and application of the contract . . . . [Article XIII of the Collective Bargaining Agreement, ¶86].

This contractual provision prohibits the Union from refusing to process gender discrimination grievances solely because the offending party happens to be a male Union member. The fact that the Union owes a duty of fair representation to all Union members does not relieve the Union of its responsibility to a female member who is sexually harassed by male members.

Durko's testimony set forth incidents of harassment, offensive remarks, and gender-motivated discrimination. The Union had a duty to pursue Durko's complaints of sexual harassment. Indeed, the Union concedes that Goodman stands for the proposition that a labor organization's discriminatory refusal to process a member's employment discrimination grievance exposes the labor organization to liability under Title VII. (See the Union's Reply Brief (Dkt. Entry 103) at 3.) The jury in this case was instructed that the Union could be found liable "only if you find that plaintiff requested the Union to pursue grievances about conduct creating a hostile work environment and the Union discriminatorily failed to pursue such grievances." (Jury Charge (Dkt. Entry 67) at 16.)[5] Accordingly, the Union's motion on the hostile work environment and respondeat superior issue must be denied.[6]

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[5]The jury was also told that it was the Employer's exclusive prerogative to discipline employees and that the Union could not be held liable simply because a Union member may have engaged in wrongful conduct.

[6]The Union's reliance upon cases addressing the issue of a labor organization's obligations to protect the general public from union members, e.g., Lizzi v. National Ass'n of Letter Carriers, 755 F.Supp. 68 (E.D.N.Y. 1991), or a union's duty concerning safety in the

C. Sufficiency Of The Evidence To Support The Jury's Finding As To The Union's Liability.

The Union asserts that Durko failed to state with adequate specificity the occasions on which she lodged complaints with the Union concerning incidents of sexual harassment and the Union's failure to respond to such complaints. See Union's Br. (Dkt. Entry # 90) at 12-13. Thus, the Union argues, it was unable to adequately defend itself against allegations of discriminatory failure to process sexual harassment grievances on Durko's behalf. Id.

While Durko's testimony was imprecise, somewhat vague, and largely uncorroborated, it did present sufficient evidence on which to impose liability against the Union. This matter presented a classic case of whether the jury would believe the plaintiff or the Union officials who purportedly failed to represent her interests, and the jury's resolution of the credibility conflict cannot be set aside.

Durko's testimony revealed that on several different occasions she approached various members of the Union trying to get them to file a sexual harassment grievance on her behalf. Durko testified that she told Union Steward Joe Thomson about several acts of harassment taken against her

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workplace, e.g., United Steelworkers v. Rawson, 492 U.S. 362 (1990); Ryan v. International Union of Operating Engineers, Local 675, 794 F.2d 641 (11th Cir. 1986), is misplaced. This case does not involve a question as to whether a duty to not discriminate exists. By statute, the Union has a duty to treat its members equally, without differentiation on the basis of gender, 42 U.S.C. §2000e(c)(1), and cannot, with impunity, "cause or attempt to cause an employee to discriminate" on the basis of gender. 42 U.S.C. §2000e(c)(3). See also 43 Pa.C.S.A. §955. These duties are reaffirmed by the Collective Bargaining Agreement. Failure to take action to protect a member from a pervasive pattern of sexual harassment can indeed violate these statutory and contractual duties. See Goodman, supra.

by Ronald Walsh, Tom Wozniak, and Walter Snopeck.[7] (Tr. Vol I, at 127-133.) Specifically, she testified that she approached Joe Thomson once per week from June of 1991 through January of 1993 with the complaints of sexual harassment, and that he would run away from her. (Tr. Vol. II, at 68-69.) She also testified that she informed Union President Peter Moska, Business Agent Joe Lutecki, and Stewards Mike Lieback and Randy Robbins of the harassment, but still the Union refused to pursue a grievance with management. (Tr. Vol. III, at 96-97, 108-110, Vol. I, at 127-133).

Addressing her attempt to have the Union file a sexual harassment grievance on her behalf, Durko testified as follows:

> Q. What about Mr. Robbins?
>
> A. Robbins, Randy Robbins did file a grievance, but they kept putting the same thing on the paper. They wouldn't put down what I wanted them to write on the paper. They put down the same thing, recall. I wanted to get a harassment charge, but they kept putting down for recall. They put down what they wanted.

(Tr. Vol I, at 145.) Durko further testified that she prepared her own sexual harassment grievance, but Gene Warnick, a shop steward would not sign it because he feared that if Peter

[7]Durko testified that Ronald Walsh, her foreman, called her revolting, demeaning, names once per week for the duration of their working relationship. (Tr. Vol. I, at 126.) She also had similar experiences with Walter Snopeck, while he trained her as an Assistant Furnace Operator. Further, she testified that Tom Wozniak, the Furnace Operator, threw hard cover books at her when he got angry. (Tr. Vol. I, at 129-132.)

Moska, the Union President, found out that he signed Durko's grievance he would be in trouble. Id. at 146.

Finally, she testified that after being called terribly offensive and degrading names by Walter Snopeck, and telling Thomson and Lutecki about it, they, too, told her that she did not have a grievance and they "dropped it right there." Id. at 130-131 Similarly when she recounted to Peter Moska, the President of the Union, a litany of harassing conduct to which she was subjected, simply stated, "It happens all over." Id. at 130.

Clearly, if the jury believed Durko, there was sufficient evidence to support a conclusion that the Union discriminatorily refused to pursue sexual harassment grievances on her behalf. Moreover, some corroboration for Durko's testimony can be gleaned from the testimony of the Union members. For example, Robbins admitted that he did not file a harassment grievance on behalf of Durko because it lacked corroboration. (Tr. Vol. III, at 83-85.) Moska acknowledged awareness of Durko's complaints, but concluded they lacked merit after conducting some investigation on his own. (Tr. Vol. IV, at 161-63.) Such evidence shows that Durko did complain to the Union and did seek to have the Union pursue grievances under the collective bargaining agreement. While Union members disputed Durko's claims of persistent complaints of harassment, the conflict in testimony was properly committed to the jury for its resolution.

As the Union observes, I expressed skepticism with respect to the evidence on this issue at the time of trial. I was particularly troubled by the lack of corroboration. But it is undoubtedly difficult to find witnesses willing to testify against the interest of not only their employer, but also their union. Absence of corroboration, therefore, was not a sufficient reason to remove this case from the jury. On the contrary this is precisely the kind of case that should be submitted to the collective wisdom of the jury of the parties'

peers. Due deference for the exercise of the jury's judgment thus warrants denial of the Union's challenge to the sufficiency of the evidence.

D. Compensatory And Punitive Damages Against The Union In Light of 42 U.S.C. §1981a.

The Union next asserts that as a matter of law it cannot be held liable for either compensatory or punitive damages under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §198la(b). The Union submits that the recent amendments to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §1981a, which allow a complaining party to recover compensatory and punitive damages in a Title VII action, expressly limit the amount of damages recoverable against a respondent on the basis of the number of employees the respondent employed. The Union maintains that because there was no evidence which established that the Union employed any employees, it cannot be held liable as a matter of law. Citing to Miller v. Maxwell's Int'l, 991 F.2d 583 (9th Cir. 1993), cert. denied, 114 S.Ct. 1049 (1994), and Verde v. City of Philadelphia, 862 F.Supp. 1329 (E.D. Pa. 1994), the Union argues that if individual employees cannot be held liable for compensatory and punitive damages under Title VII, labor organizations are similarly exempted from liability. See Union's Br. at 20-22.

The Union misinterprets the amendments to Title VII found in 42 U.S.C. §1981a. Through the 1991 amendments to Title VII, Congress imposed liability for compensatory and punitive damages on a "respondent" under certain circumstances. The definition of respondent in Title VII includes an "employer, employment agency, labor organization, joint labor management committee controlling apprenticeship or other training or retraining program . . ." 42 U.S.C. §2000e(n)(emphasis added). To be liable as an "employer," one must employ at least fifteen or more people or be an agent of such person. 42 U.S.C. §2000e(b). Thus, employment of a certain number of employees is a condition

to any liability under Title VII for a qualifying "employer." But no numerical threshold exists to impose liability on a labor organization.

A party that comes within the purview of Title VII, e.g., an employer with at least 15 employees or a labor organization regardless of the number of employees, is liable for back pay and, by virtue of the 1991 Civil Rights Amendments, items of compensatory damages such as emotional distress and humiliation. Section §198la(b)(3) limits the amount of such compensatory damages that may be imposed against a "respondent" based on the number of employees that the respondent employs. It serves as a limitation on the amount of damages that can be awarded to a complaining party, and not as a precondition for the award of damages. In short, a "respondent" is liable for back pay, emotional distress, etc., and 42 U.S.C. §198la(b)(3) only establishes liability limits with respect to pain and suffering and punitive damages.

As Durko argues, because section 198la(b)(3) establishes damage limits, a party that falls within the purview of Title VII, such as a labor organization or employer of at least 15 persons, should bear the burden of establishing the number of its employees for purposes of limiting its liability. Cf., Strauss v. Stratojac Corp., 810 F.2d 679, 687 (7th Cir. 1987); Stinson v. Edgemoor Iron Works, Inc., 53 F. Supp. 864, 868 (D. Del. 1944) (generally, burden of proof is on the defendant when it is seeking to mitigate its liability). In this case, there is no dispute that the Union comes within Title VII's coverage. There is also no dispute that the Union did not present any evidence as to the number of person it employed. Thus, the Union cannot avoid liability on the basis that it does not employ a sufficient number of employees to authorize the imposition of any damages.

Even if the burden was on Durko to establish the number of persons employed by the Union, the evidence permits an inference that the Union employed a sufficient number of

persons to expose it to liability of up to $50,000. In this regard, it is undisputed that the Union had more than 50 paid stewards as well as a paid president, business agent and financial secretary.

Indeed, careful consideration of the statutory scheme warrants imposition of liability of compensatory and punitive damages on the Union even if it employed less than 15 persons. Section 198la(b) expressly exempts a government, government agency or political subdivision from liability for punitive damages. By identifying those parties exempt from liability, Congress signalled its intent that labor organizations are not insulated from liability. Cf., U.S. ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1502 (llth Cir. 1991) ("where a statute explicitly enumerates certain exceptions to a general.grant of power, courts should be reluctant to imply additional exceptions in the absence of a clear legislative intent to the contrary").

The numerical threshold of 15 employees in §198la(b)(3) corresponds with the numerical threshold for imposing any liability on an "employer." As noted above, no such threshold applies with respect to labor organizations. Because it is evident that Congress intended to expose labor organizations to liability for compensatory and punitive damages, it is clear that a union may be held liable for at least $50,000 in compensatory and punitive damages even if it employs less than 15 persons or no persons at all.

The Union's reliance on cases that refuse to impose liability on individuals is misplaced. Those cases hold that individuals have no liability for back pay under §706(g) of Title VII, 42 U.S.C. §2000e-5(g), or any other item of damages. See, e.g., Miller, supra; Sattar v. Unocal Corp., 829 F.Supp. 331, 334 (N.D. Cal. 1993). The courts have recognized that in 1964 Congress did not intend to hold individuals liable for any damages, and that the 1991 Civil Rights Act, with its liability limits based on numbers of persons employed, confirms the original legislative intent. See,

e.g., Tomka v. Seiler Corp., 66 F.3d 1295, 1314-15 (2d Cir. 1995). In short, individual employees are not "respondents" under section 1981a. But labor organizations are indisputably "respondents" under that section and Congress clearly intended to hold them liable for pain and suffering damages.[8] Accordingly, case law holding that individuals are not subject to any damages liability under Title VII is not applicable here.

The Union has not cited any other authority or legislative history in support of its contention that §1981a does not apply to labor organizations. Accordingly, this challenge to the jury verdict must also be denied.

Regardless of the availability or limitation of these damages under Title VII, Durko is, nevertheless, entitled to punitive damages on her claim under the PHRA. Although the Supreme Court of Pennsylvania has yet to rule directly on the availability of punitive damages under the PHRA, courts in this District have recently held that such damages are available. Rogers v. Mount Union Borough, 816 F.Supp. 308, 316 (M.D. Pa. 1993)(PHRA claimant may be awarded punitive damages); Keck v. Commercial Union Ins. Co., 758 F.Supp. 1034, 1039 (M.D. Pa. 1991). In Keck, supra, the court noted that the Pennsylvania Commonwealth Court has upheld punitive damages, expressly ruling that the PHRA does not contain the damages limitations previously expressed in Title VII. Keck, 758 F.Supp. at 1040, citing Brown Transport Corp. v. Commonwealth, Pennsylvania Human Relations Com., 133 Pa. Commw. 545, 578 A.2d 555, 562 (1990). In addition, numerous other courts in this circuit have held that punitive damages are permitted by the PHRA. Clark v. Pennsylvania, 885 F.Supp. 694, 715 (E.D. Pa. 1995); Griffiths v. Cigna Corp., 857 F.Supp. 399 (E.D. of Pa. 1994); Galeone v. American Packaging Corp., 764 F.Supp. 349, 352 (E.D. Pa.

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[8]The legislative history quoted in Tomka notes that "coverage (of Title VII] is limited to businesses ... labor organizations affecting commerce.'" 66 F.3d at 1314 (emphasis added).

1991); Lubin v. American Packaging Corp.., 760 F.Supp. 450, 451 (E.D. Pa. 1991). I adopt the holdings of those courts permitting the award of punitive damages under the PHRA. The defendant Union's motion on this issue will, therefore, be denied.

E. Sufficiency Of Evidence supporting Award of Punitive Damages

Title VII directs that punitive damages are allowed if "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. §198la(b). Under the PHRA a defendant must knowingly and maliciously deprive a plaintiff of her civil rights for such damages to be awarded. Rogers v. Mount Union Borough, 816 F.Supp. 308 (M.D. Pa. 1993). Punitive damages are appropriate when the defendant acted with the intent to harm or with reckless indifference to the harm likely to flow from his or her conduct. Field v. Philadelphia Elec. Co., 380 Pa. Super. 400 565 A.2d 1170, 1182 (1989).

A review of the record indicates that Durko has presented sufficient evidence for the jury to have reasonably found that the Union acted with malice or reckless indifference to the rights of Durko. As related above, Durko testified that she approached Joe Thomson once per week from June of 1991 through January of 1993 with her complaints of sexual harassment, and that he would run away from her and not file such complaints. (Tr. Vol. III, at 6869.) She also testified that she informed Union President Peter Moska, Business Agent Joe Lutecki, and Stewards Mike Lieback and Randy-Robbins of the harassment, but still the Union filed no grievance. (Tr. Vol. III, at 96-97, 108-110, Vol. I, at 127-133). Durko told all of her stewards about the sexual harassment and was told that if the grievance contained a sexual harassment charge, they would not sign it. (Tr. Vol. II, at 33.)

The duration and egregious nature of the complaints that constituted Durko's claims of hostile environment plainly support the appropriateness of the punitive damages award. The Union's failure to process these complaints and file a grievance on Durko's behalf, after her often-repeated requests over a period of more than two years, evidenced maliciousness and indifference toward Durko. Accordingly, the Union's challenge to the punitive damage award must be rejected.

F. Request For Remittitur Due To An Excessive Award of Punitive And Compensatory Damages.

The Union asserts that the compensatory and punitive damages awarded against it were so excessive as to require a remittitur. A remittitur is available where the verdict is so large as to offend the conscience of the court. Motter v. Everest & Jennings, Inc., 883 F.2d 1223, 1230 (3rd Cir. 1989); Bolden v. Southeastern Pa. Transp. Auth., 820 F.Supp. 949, 951 (E.D. Pa. 1993), aff'd., 1994 U.S. App. Lexis 6575 (3rd. Cir. 1994).

The award of damages in this case is not excessive in light of the severity of the actions taken by the Union and the callous indifference it showed to Durko's rights. In addition, the effect of the Union's conduct on Durko further supports the reasonableness of the jury's damage award against the Union. As a result of the Union failing to file a grievance on behalf of Durko and, thus, allowing the hostile environment to continue, Durko endured crying spells to the point of hyperventilation. Further, it forced her to lose her self-respect and caused her to be constantly on edge. The unremedied, continuing harassment left her feeling that she always had to prove herself and quite often left her unable to sleep. (Tr. Vol I, at 157, Vol II, at 170-172.) After hearing all of the evidence, the jury awarded damages it found to be appropriate. Based on the evidence in the record, the damage award is not excessive.

Nor can it be said that the amount of the punitive damages is excessive in view of the Union's resources. The Union has more than 1,200 members and has net assets exceeding $100,000. Clearly an award of $25,000 in punitive damages is not conscience-shocking. Accordingly, the defendant Union's request for a remittitur will be denied.

G. The Need For A New Trial Based On The Improper Exclusion Of Evidence.

The Union contends that the Court erred when it refused to allow the Union to admit into evidence the written determinations of the National Labor Relations Board (NLRB) concerning Durko's unfair labor practice charges alleging that the Union discriminated against her in its handling and processing of grievances involving a seniority dispute caused by the Employer's posting of the job bid for assistant furnace operator. See Union's Br. at 30. The Union submits that it should also have been allowed to otherwise refer to Durko's failed attempts to litigate these issues before the NLRB. Id. at 32. It further asserts that the exclusion of such evidence was prejudicial insofar as the Union intended to introduce the determinations as evidence that the Union did not discriminate against Durko on account of her gender with respect to the processing and handling of grievances. Id. at 33.

In support of its position, the Union relies upon Arnold v. United Asso. of Journeymen & Apprentices of Plumbing & Pipe Fitting Industry, 388 F.Supp. 1105, 1107 (W.D. Pa. 1975), aff'd mem. op., 529 F.2d 511 (3rd Cir. 1975), and Smith v. Local 25, Sheet Metal Workers International Asso., 500 F.2d 741 (5th Cir. 1974). Durko correctly notes in her brief that during the trial the Union's request to admit this evidence was denied and its argument based on the aforementioned cases was rejected. At trial, Arnold, supra, was distinguished from the instant case in that although an NLRB determination adverse to the plaintiff was considered in Arnold, it was a non-jury case in which the possible

prejudice of allowing such evidence did not outweigh its probative value. (Tr. Vol. II, at 64.)[9]

In this case, the marginal relevance of the NLRB determinations was completely outweighed by the probability of prejudice. A strong possibility existed that the jury would improperly substitute the determination of another fact-finding body, the NLRB, for its own considered judgment of the evidence or accord it far too much weight in its ultimate decision. Therefore, the exclusion of this evidence was not improper, and the defendant Union's argument on this issue must be rejected.

Furthermore, any error in excluding this evidence was harmless. The NLRB determinations concerned Durko's claims that her gender was a determinative factor in the Union's processing of grievances concerning the assistant furnace operator's position. The jury found in favor of the Union on this issue. But the NLRB was not presented with claims concerning the Union's failure to process sexual harassment claims. (Tr. Vol. II at 57-67.) The NLRB's findings on the claims concerning the assistant furnace operator have little, if any, probative value on the sexual harassment claims. Accordingly, the Union is not entitled to a new trial on this issue.

H. New Trial Based on Error In Instructions To The Jury.

Finally, the Union maintains that it is entitled to a new trial because the Court erred in failing to give requested instructions with respect to the significance of the existence of

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[9]For similar reasons, Smith, supra, is distinguishable. That case addressed a summary judgment motion, in which the court considered the NLRB determination. Thus, the problem of unfair prejudice outweighing probative value was not a factor in Smith, as it was in the instant case.

a respondeat superior relationship for purposes of establishing a sexually hostile work environment. See Union's Br. at 34. This assertion must also be rejected. As examined previously under subsection "A" of this Memorandum, the case of Goodman v. Lukens Steel, 482 U.S. 656 (1987), is dispositive of this issue. There, the United States Supreme Court held that a union could be held liable for a hostile work environment if it discriminatorily chose not to process harassment grievances. In the present action, all requirements for the finding of liability against the defendant Union, pursuant to the direction of Goodman, have been met.

The Court properly instructed the jury on this issue when it stated:

> The Union does owe Plaintiff a normal duty of fair representation which means that the Union.may not discriminatorily refuse to process grievances of sexual harassment.
>
> Thus, the Union may be held liable only if you find that Plaintiff requested the Union to pursue grievances about conduct creating a hostile work environment and the Union discriminatorily failed to pursue such grievances.

(Tr. Vol. 5, at 147.) Because the correct jury instruction was given as to the proper standard of liability, no error occurred and the Union's motion as to this issue must be denied.

III. CONCLUSION

For the foregoing reasons, the Union's post-trial motion will be denied. An appropriate order is attached.

Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

DATED: December 30, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARMELA P. DURKO,	:	
	:	**No. 4:CV-93-1284**
Plaintiff	:	
	:	**(JUDGE VANASKIE)**
v.	:	
	:	
OI-NEG TV	:	
PRODUCTS, INC., AND	:	
GLASS, MOLDERS,	:	**FILED**
POTTERY, PLASTICS	:	**SCRANTON**
& ALLIED WORKERS	:	**DECEMBER 31, 1995**
INTERNATIONAL	:	**PER DEPUTY**
UNION AFL-CIO, CLC	:	**CLERK**
No. 243,	:	
	:	
Defendants	:	

ORDER

AND NOW, THIS 30th DAY OF DECEMBER, 1995, for the reasons set forth in the accompanying Memorandum, **IT IS HEREBY ORDERED:**

1. The Defendant Union's Renewal Motion for Judgment as a matter of law, and/or for new trial, or a remittitur (Dkt. Entry # 83) is **DENIED.**

Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-7061 and 96-7062

CARMELA F. DURKO

v.

OI-NEG TV PRODUCTS, INC.; GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL AFL-CIO, CLC NO. 243

OI-NEG TV PRODUCTS, INC.,

Appellant in No. 96-7061

GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL AFL-CIO, CLC NO. 243,

Appellant in No. 96-7062

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 93-cv-01284)
District Judge: Hon. Thomas I. Vanaskie

Submitted Pursuant to Third Circuit LAR 34.1(a)
October 29, 1996

Before: SCIRICA and COWEN, Circuit Judges and FEIKENS*, District Judge

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*Honorable John Feikens, United States District Judge for the Eastern District of Michigan, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgments of the district court on December 29, 1995, and January 2, 1996 be and are hereby affirmed, substantially for the reasons set forth by Judge Vanaskie in his opinions filed December 29, 1995, and December 31, 1995. Costs taxed against appellants.

ATTEST: By the Court,

P. Douglas Sisk
P. Douglas Sisk,
Clerk
Dated: November 12, 1996

Robert E. Cowen
CIRCUIT JUDGE

F I L E D
MAR 14 1997
CLERK

No. 96-1273

In The

Supreme Court of the United States

October Term, 1996

GLASS MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL AFL-CIO, CLC NO. 243,

Petitioner,

vs.

CARMELA F. DURKO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a union can be held liable for punitive damages pursuant to Title VII of the Civil Rights Act and the Pennsylvania Human Relations Act?

2. Whether the previous determinations of the National Labor Relations Board dealing with Ms. Durko's allegation of discrimination regarding the Union's handling of her grievance involving a seniority dispute were irrelevant to her claims that the Union discriminatorily failed to process her sexual harassment grievances, therefore causing any issue as to the propriety of exclusion of such evidence moot?

3. Whether the courts below properly upheld the factual finding of the jury that the Union discriminatorily failed to pursue sexual harassment grievances on behalf of Ms. Durko?

4. Whether the courts below properly refused to remit the twenty-five thousand ($25,000) dollar punitive damage award against the Union, considering the Union's deliberate and discriminatory failure to pursue sexual harassment grievances on Ms. Durko's behalf?

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STATEMENT OF THE CASE

A. Procedural History

This action was commenced by Complaint filed by Carmela F. Durko on August 17, 1993, setting forth a cause of action against OI-NEG TV Products, Inc., hereinafter "Employer," for discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), *et seq.*, as well as a claim of discrimination based on sex pursuant to the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 951, *et seq.* (App. 12-94).[1]

The Complaint further sets forth similar causes of action against Glass, Molders, Pottery, Plastics & Allied Workers International AFL-CIO, CLC No. 243, hereafter "Union" for discrimination in violation of Title VII and the PHRA. (*Id.*)

A jury trial commenced on September 20, 1994 and concluded on September 26, 1994. With respect to the Employer, the jury found that Ms. Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment, and that the Employer was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action (App. 132-135). The jury awarded compensatory damages from Employer in the amount of fifty thousand dollars ($50,000) (App. 133).

With respect to the Union, the jury found that Ms. Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment and that the Union discriminatorily failed to pursue sexual harassment grievances on her behalf (App. 134). The jury awarded fifty

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1. "App." refers to the joint appendix filed with the Court of Appeals for the Third Circuit.

thousand dollars ($50,000) in compensatory damages and twenty five thousand dollars ($25,000) in punitive damages from the Union (App. 134-135). Judgment was entered by the District Court on September 28, 1994 (App. 423).

On or about October 12, 1994, both Employer and Union filed post-trial motions (App. 428-438). The motions of the Employer and Union were denied by the District Court by Memoranda and Orders dated December 29, 1995 and December 31, 1995 respectively (App. 1653-1691, 1672-1694).

The Employer filed its appeal to this Honorable Court on January 26, 1996 (App. 1695) with the Union filing its appeal on January 29, 1996 (App. 1696).

The Employer and Union filed appeals to the Third Circuit which were denied by Order dated November 12, 1996.

B. Factual Background

Carmela Durko became employed by Employer on or about March 31, 1986 (App. 15). At all relevant times, Ms. Durko was a member of Local 243 of the Glass, Molders, Pottery, Plastic & Allied Workers International Union AFL-CIO-CLC, hereinafter "Union" (App. 15).

The issues pertinent to the present petitions arise from the jury's finding that Ms. Durko was subjected to hostile work environment sexual harassment of which the Employer was aware, and failed to take appropriate action, as well as the finding that the Union discriminatorily failed to pursue sexual harassment grievances on Ms. Durko's behalf (App. 132-135).

The jury found for the Employer and Union with respect to Ms. Durko's claim that she was removed by the Employer from

her position as Assistant Furnace Operator because of her sex, and that her gender was a determinative factor in the Union's decisions involving resolution of Ms. Durko's grievances relative to such removal. These verdicts in favor of the Employer and Union relative to Ms. Durko's claim of recall rights to the Assistant Furnace Operator's position have not been appealed and therefore are not before this Honorable Court.

The sexual harassment of Ms. Durko began in June of 1991, when she began working in the Batch and Furnace Department as an Assistant Furnace Operator (App. 16). Ms. Durko was initially given a tour by her foreman, Ron Walsh, during which Ms. Durko was made to crawl under the extremely hot furnace and go to the batch house to a height of approximately five stories (App. 541-545). The only protective equipment given to Ms. Durko to wear during this tour was a pair of paper coveralls, when the required safety equipment consisted of material coveralls and a respirator to prevent the inhalation of dangerous chemicals (App. 541-550).

Ms. Durko testified that from her observations of men being taken on similar tours, none were taken underneath the furnace (App. 675).

During the time Ms. Durko worked as an Assistant Furnace Operator, Mr. Walsh, her foreman and a member of management, would continually call Ms. Durko vile and disgusting names containing references to her gender, such as "dumb cunt" and "stupid bitch" (App. 564). Regarding the time it would take Ms. Durko to qualify as an Assistant Furnace Operator, Mr. Walsh stated that it would take her eighteen months to be qualified, and if she would be "nice to him", it would take her nine months (App. 563). Ms. Durko immediately made Mr. Walsh aware of her anger regarding such comment (App. 564).

On one of David Troutline's tours, Ms. Durko was requested to push a heavy charger to see if she could handle the job (App. 582). After Ms. Durko pushed the charger with all of her might, and she could not do it, Mr. Troutline stated "Well, that's part of your job duties. If you can't do that, well then you should turn down the job" (App. 616). During this incident, Mr. Troutline purposely neglected to tell Ms. Durko that the brake was on, with Ms. Durko only finding out that the brake was engaged when another worker approached her and took the brake off (App. 582).

Ms. Durko was also sexually harassed by Tom Wozniak, a Furnace Operator in the Batch and Furnace Department. During her initial five day trial period at the position of Assistant Furnace Operator, Mr. Wozniak would tell her that she "broke the barrier" by being the first woman as an Assistant Furnace Operator, kept taking her on tours of the "hot spots" of the department and repeatedly told her "You'll never do it. You'll never make it", as well as telling her "It's not a job for a woman" (App. 554-555).

While working with Ms. Durko, Mr. Wozniak would remark that she was "flat chested" approximately once a day for the eighteen month period Ms. Durko was in the Batch and Furnace Department (App. 573).

Approximately three months after she had begun the position in June of 1991, Mr. Wozniak began throwing hard cover books at her whenever he would get angry, striking her on one occasion (App. 570, 684).

Walter Snopeck, who was tasked with training Ms. Durko as an Assistant Furnace Operator, also called her crude names containing references to her gender, such as "dumb cunt" and "stupid bitch," plenty of times during the period of time she worked in the Batch and Furnace Department (App. 567-568).

Regarding the incidents of sexual harassment, Ms. Durko made reports to Union Stewards Randy Robbins, Mike Lieback, Joe Thomson, Gene Warnick, and Tom Yankey, as well as Union President Peter Moska and Union Business Agent Joseph Lutecki (App. 565-571, 574-585). Although certain Union representatives filed grievances regarding Ms. Durko's recall rights, no Union representative would submit a sexual harassment charge, despite repeated requests by Ms. Durko (App. 583).

Ms. Durko filed a Complaint with the Pennsylvania Human Relations Commission on August 4, 1992, containing, *inter alia* allegations of a sexually hostile work environment by both Employer and Union (App. 279).

Margaret Guffrovich, a witness for Employer, stated that such complaint was served on Employer as early as September, 1992 (App. 1439).

Further, at trial, it was stipulated *as fact* by the Employer and all other parties that the Employer had actual notice of Ms. Durko's complaints of sexual harassment by Mr. Walsh, a member of management. The stipulation of fact was as follows:

> Union President, Peter Moska, asked Margaret Guffrovich, from personnel, to investigate Ms. Durko's complaints of harassment against Mr. Walsh. After speaking with Mr. Walsh, Ms. Guffrovich reported back to Mr. Moska that there was no basis for Ms. Durko's complaints. (App. 525).

Mr. Moska also confirmed the reports of sexual harassment to the Personnel Department (App. 1325-1335).

Mr. Walsh testified that he attended a meeting with Margaret Guffrovich and Mary Reynolds, another member of management, regarding the allegations of harassment, after which he did it not hear back from either member of management and was not disciplined (App. 991-996).

On January 13, 1993, Ms. Durko was transferred to the Forming and Selecting Department because her temporary bid as Assistant Furnace Operator had expired (App. 588). Ms. Durko was subjected to being called a variety of vulgar names over the public address system, accompanied by loud moaning, with her name being loudly screamed (App. 593). It was Ms. Durko's unrebutted testimony that she told her foreman, Lenny Brown, about this (*id.*), as well as Union President Peter Moska. Further, Ms. Durko and Mr. Moska both reported the harassment to William Konopasek, Human Resource Supervisor, a member of management. (*Id.*) After meeting with Mr. Konopasek, speakers were allegedly put in his office, but Ms. Durko testified that the harassment continued until she left the Forming and Selecting Department. (*Id.*) At trial, Mr. Konopasek acknowledged that he did not investigate the matter, as Ms. Durko did not provide him information as to who was responsible for the noises (App. 906-909).

REASONS FOR DENYING THE WRIT

Standard for Granting Writ of Certiorari

The rules of this Court state that a Petition for Writ of Certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10.

In general, the Supreme Court will not grant a Writ of Certiorari merely to review evidence or inferences drawn from it. *General Copy Pictures Corp. v. Western Electric Co.*, 304

U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938). Certiorari will also be denied if the case involves circumstances or issues which are not likely to be repeated, *see Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955) (noting that the Court reviews issues that are "beyond the academic or the mere episodic"); 13 James W. Moore, ed., *Moore's Federal Practice,* para. 810.21 at SC 10-23 (2d ed. 1995) (stating that the Court will not be inclined to review "an issue that is unlikely to recur" or "results from a unique factual situation"), or if "the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Moreover, certiorari will be granted "only in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority" between the Courts of Appeals. *NLRB v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502 (1951) (*quoting Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923)).

Finally, the Court has refrained from resolving conflicts that arise between panels within the same circuit, on the grounds that such conflicts should be resolved by the Court of Appeals internally. *See, e.g., Taylor v. United States,* 493 U.S. 906, (1989); *Davis v. United States,* 417 U.S. 333, 340 (1974); *Wisniewski v. United States,* 353 U.S. 901, 902 (1957).

I.

A UNION CAN CLEARLY BE HELD LIABLE FOR PUNITIVE DAMAGES PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT AND THE PENNSYLVANIA HUMAN RELATIONS ACT.

The Union's Petition for Writ of Certiorari with regard to

its claim that a Union cannot be held liable for punitive damages as a matter of law must be denied, as, although such issue is of first impression for the United States Supreme Court, the answer to such issue is obvious from a plain reading of the Civil Rights Act of 1964, as amended, as well as by the decision of the highest state court in Pennsylvania to review the issue with regard to the application of the Pennsylvania Human Relations Act.

The Union asserts that it cannot be liable for punitive damages under either Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981a, or the Pennsylvania Human Relations Act. Importantly, Union cites no provisions of the above-referenced statutes, nor any case law interpreting such statutes which supports such proposition.

The 1991 amendments to Title VII impose liability for compensatory and punitive damages on a "respondent" under certain circumstances, as follows:

> (b) Compensatory and punitive damages.
>
> > (1) Determination of Punitive damages. A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency, or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b).

Thus, a plaintiff's right to punitive damages against a respondent that has engaged in discrimination cannot be denied.

The definition of "respondent" in Title VII includes an Employer, employment agency, *labor organization,* joint labor management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to § 717. 42 U.S.C. § 2000e(n) (emphasis added).

The Pennsylvania Human Relations Act prohibits discrimination by labor organizations on the basis of sex. (*See* 43 Pa. C.S.A. § 955(c)-(e)).

The Union argues that since punitive damages are not available under the National Labor Relations Act in some circuits for breach of a Union's duty of fair representation, that this somehow precludes an award of punitive damages under Title VII of the Civil Rights Act. Union further argues that since an individual employee cannot be liable for punitive and compensatory damages under Title VII, that this somehow, by analogy, absolves a labor union of similar liability. Union also argues that it cannot be held liable absent evidence that it employs any employees under the damage limitation section of the 1991 amendments, 42 U.S.C § 1981a(b).

Union cites *Miller v. Maxwell's International, Inc.*, 991 F.2d 583 (9th Cir. 1993), and *Verde v. City of Philadelphia*, 862 F. Supp. 1329 (E.D. Pa. 1994), for the proposition that *individual employees* cannot be held liable for compensatory and punitive damages under Title VII as Congress did not intend to impose liability on individuals who had the misfortune to work for large employers. The Union then equates the status of an individual employee with that of a labor union, and concludes that labor unions are also excluded from liability. The Union cites no cases

in which a union was excluded from liability based on the limitations stated in 42 U.S.C. § 1981a(b).

The Union's reliance on the above cases is misplaced, in that such cases hold that individuals have *no* liability for backpay or any other item of damages under § 706(g) of Title VII. The courts have recognized that in 1964, Congress did not intend to hold individuals liable for *any* damages, and that the 1991 Civil Rights Act, with its liability limits based on numbers of persons employed, confirms the original legislative intent. *See, e.g., Tomka v. Seller Corp.*, 66 F.3d 1295, 1314-15 (2nd Cir. 1995). Thus, individual employees are not "respondents" under § 1981a, and labor organizations are "respondents" under that section.

The Court of Appeals for the Second Circuit has recently found that in order to hold a local union liable in its capacity as a labor organization under Title VII, the plaintiff must allege that she was discriminated against in her capacity as a union member as opposed to her capacity as union employee. *Yerdon v. Henry*, 91 F.3d 370 (2d Cir. 1996).

Thus, the distinction between the union acting as a labor organization, and the union acting as an employer, is critical. In *Yerdon, supra,* the plaintiff, a secretary to the local union, was sexually harassed by newly nominated officers of the union in an effort to force her to resign. Because the union was acting in its capacity as employer, the threshold number of employees which must be met before liability is assessed was applicable.

In the present case, there is no dispute that Ms. Durko sued her Union in her capacity as a Union member rather than an employee of the Union, which she definitely was not.

Therefore, the numerical requirements relative to "employer" are not applicable under the present facts. *See also*

Chavaro v. Local 241, Div. of the Amalgamated Transit Union, 787 F.2d 1154 (7th Cir. 1986) (Under Title VII, a union can be both an "employer" and a "labor organization." As a labor organization, the union is covered under the Act and may be liable with respect to its dealings with employers or its membership, *see* 42 U.S.C. § 2000e-2(c), if it fits the definition of a labor organization).

Regarding the Union's assertion that 42 U.S.C. § 1981a(b) absolves it from liability in the absence of evidence that it employs any employees, such interpretation ignores the plain language of that statute, which indicates that such section allows for *limitations* of compensatory and punitive damages rather than an exclusion of such damages.

The Union implies that it is Ms. Durko's burden to present evidence of the number of its employees so that she can limit her own damages. It is respectfully asserted that it is the Union's burden to present evidence that would limit its liability. *Cf. Strauss v. Stratojac Corp.*, 810 F.2d 679, 687 (7th Cir. 1987); *Stinson v. Edgemoor Iron Works, Inc.*, 53 F. Supp. 864, 868 (D. Del. 1944) (generally burden of proof is on the defendant when it is seeking to mitigate its liability).

It is also submitted that if the Union presented no such evidence, no limitation applies.

Alternatively, even if it is deemed that Ms. Durko had the burden to provide evidence to limit her own damages, evidence of record indicates that the Union had at least fifty-two paid employees sufficient to award compensatory and punitive damages, even under the Union's theory (App. 70-73, 544, 1153, 1377-1378).

Therefore, based on the above discussion, the Union has

sufficient employees to impose liability, even if the Union's argument regarding such threshold is adopted.

Even if it is determined that compensatory and punitive damages are somehow limited under 42 U.S.C. § 1981a, Ms. Durko is entitled to punitive and compensatory damages under her claim pursuant to the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 951, *et seq.*, without limitation.

It has been held that punitive and compensatory damages are available under the PHRA, *Rogers v. Mt. Union Borough By Zook*, 816 F. Supp. 3?8 (M.D. Pa. 1993); *Keck v. Commercial Union Insurance Co.*, 758 F. Supp. 1034 (M.D. Pa. 1991).

In *Keck, supra,* the Court stated

> . . . The Pennsylvania Commonwealth Court has upheld the award of punitive damages, expressly holding that the PHRA does not contain the damages limitation expressed in Title VII. *Brown Transport Corp. v. Commonwealth of Pa., PHRC,* 133 Pa. Com. 545, 578 A.2d 555, 562 (1990).
>
> Further, other courts have recognized that relief under the PHRA is not limited to that available under Title VII. See e.g. *Nestor v. Quaker State Coca-Cola Bottling Co.,* 579 F. Supp. 289, 292 (W.D. PA 1984); *PHRC v. Zanmantakis,* 478 Pa. 454, 459, 387 A.2d 70, 73 (1978) (under "legal or equitable relief" provision, the court could award damages for humiliation and mental anguish).

Id. at 1040.

As stated above, the PHRA contains no limitation on an award of punitive damages. Thus, even if Title VII is interpreted to limit such damages, the jury was subject to no such constraints pursuant to Ms. Durko's state cause of action.

Additionally, numerous other courts within the Third Circuit have held that punitive damages are permitted by the PHRA. *See, e.g., Clark v. Pennsylvania,* 885 F. Supp. 694, 715 (E.D. Pa. 1995); *Griffiths v. Cigna Corp.*, 857 F. Supp. 399 (E.D. Pa. 1994); *Galeone v. American Packaging Corp.*, 764 F. Supp 349, 352 (E.D. Pa. 1991); *Lubin v. American Packaging Corp.*, 760 F. Supp. 450, 451 (E.D. Pa. 1991).

In the absence of an authoritative pronouncement from the Pennsylvania Supreme Court, a federal court must predict how that court would rule. As stated in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3rd Cir. 1981):

> To make this prognostication, we are not inflexibly confined by dicta or by lower state court decisions, *although we should look to such statements as indicia of how the state's highest court might decide. See, McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3rd Cir. 1980).

Id. at 657 (Emphasis added).

It is submitted that the Pennsylvania Commonwealth Court case of *Brown Transport Corp., supra,* provides strong indicia of how the Pennsylvania Supreme Court would rule on the issue of whether punitive damages are allowed under the PHRA, as well as the numerous federal court rulings cited above predicting the same result.

II.

THE PRIOR DETERMINATIONS OF THE NATIONAL LABOR RELATIONS BOARD WERE PROPERLY EXCLUDED AS THEIR PREJUDICIAL EFFECT OUTWEIGHED THEIR PROBATIVE VALUE. ALSO, SUCH DETERMINATION DID NOT ADDRESS THE ISSUE OF WHETHER THE UNION DISCRIMINATORILY FAILED TO FILE SEXUAL HARASSMENT GRIEVANCES ON MS. DURKO'S BEHALF.

The Union's Petition for Writ of Certiorari with regard to whether the previous determinations of the National Labor Relations Board were properly excluded from evidence must be denied as this is again an allegation of error with regard to a misapplication of or properly stated rule of law. Sup. Ct. R. 10.

The Union's request that the previous NLRB determination should have been submitted to the jury was properly denied by the court below.

It is critical to note that the NLRB has never ruled on the issue of whether the Union discriminatorily failed to file grievances regarding *sexual harassment* on behalf of Ms. Durko. By letter dated September 14, 1992, the NLRB clearly stated the allegations against the Local and International Unions as follows:

> The charges against the Unions allege that they breached their duty of fair representation by failing to process your grievances over being bumped from the Assistant Furnace Operator position . . .

(App. 210).

In its second ruling on April 12, 1993, the NLRB again clearly stated the issue upon which it was issuing a ruling as follows:

> . . . [T]he charge against the Union alleges that it failed to process a grievance over your unsuccessful bid for Assistant Furnace Operator — A Shift in January, 1993, in violation of the duty of fair representation . . .

(App. 213).

Again, the NLRB was never tasked with deciding the issue as to whether the Union discriminatorily failed to process sexual harassment grievances on behalf of Ms. Durko, and never issued a decision on that issue. Also the jury found against the respondent with regard to her claim that the grievances regarding the Assistant Furnace Operator's position were discriminatorily processed, making the NLRB' s determinations irrelevant.

In support of its position that the NLRB's determinations were improperly excluded, the Union relies on *Arnold v. United Association of Journeymen*, 388 F. Supp. 1105 (W.D. Pa. 1975), *aff'd*, 529 F.2d 511 (3rd Cir. 1975), and *Smith v. Local 25, Sheetmetal Workers International*, 500 F.2d 741 (5th Cir. 1974).

In the present case, the trial court found that

> . . . the marginal relevance of the NLRB's determinations was completely outweighed by the probability of prejudice. A strong possibility existed that the jury would improperly substitute the determination of another fact-finding body, the NLRB, for its own considered judgment of the evidence or

> accord it far too much weight in its ultimate decision . . .

(Union's Petition at A-18).

The possibility of prejudice outweighing the probative value of such evidence was not an issue in *Arnold, supra,* in that such case was a non-jury trial. The possibility of prejudice outweighing the probative value of such evidence was also not an issue in *Smith, supra,* a case which addressed a summary judgment motion, in which the court considered the NLRB determination.

Although Union cites cases which allow such determinations in certain circuits to have *res judicata* effect in future actions under Sec. 301 of the NLRA, *see, e.g., Baker v. Detroit Riverview Hospital,* 834 F. Supp. 216 (E.D. Mi. 1993); *Rudolph v. Wagner Electric Corporation,* 68 CCH 12, 798 (E.D. Mo. 1972), Union acknowledges that the authorities are split on such proposition (Union's Petition at 18). Further, the Union cites no case in which an adverse NLRB determination was held admissible in a Title VII action.

Therefore, the exclusion of such evidence was proper and not prejudicial to the Union in any way.

III.

THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S DETERMINATION THAT THE UNION DISCRIMINATORILY FAILED TO PURSUE SEXUAL HARASSMENT GRIEVANCES ON BEHALF OF MS. DURKO.

The Union's Petition for Writ of Certiorari must be denied

as its allegation with regard to the above issue merely alleges an erroneous factual finding in the court below. Sup. Ct. R. 10

Union asserts that Ms. Durko failed to state with adequate specificity the occasions on which Ms. Durko lodged complaints with the Union concerning incidents of sexual harassment and the Union's failure to respond to such complaints (Union's Petition at 17).

Specifically, Ms. Durko testified that she approached Joe Thomson once per week from June of 1991 through January of 1993 with the complaints of sexual harassment and that he would run away from her (App. 668-669). Ms. Durko also told Business Agent Joseph Lutecki and Union President Peter Moska of the sexual harassment by Mr. Snopeck and Mr. Walsh (App. 568-569). Ms. Durko also reported being sexually harassed to Union Stewards Robbins, Lieback, Warnick, and Yankey, with no grievances subsequently filed on her behalf (App. 686-688, 1250-1257).

Regarding sexual harassment, Mr. Moska stated to Ms. Durko that she had no grievance (App. 682-683).

Further, on or about January of 1993, Ms. Durko complained to Union President Peter Moska about being sexually harassed over the intercom system, with both Ms. Durko and Mr. Moska informing Human Resources Director, William Konopasek, of the harassment (App. 594). Although the harassment did not stop after such meeting, no grievance was filed.

Union cites *Frazier v. Southeastern Pennsylvania Transp. Auth.*, 785 F.2d 65 (3rd Cir. 1986), for the proposition that:

> Conclusory allegations of mishandled grievances, without providing specificity,

> leads to the conclusion that the claims are frivolous and ultimately should lead to the dismissal of those claims.

(Union's Petition at 20).

However, *Frazier,* dealt with the sufficiency of allegations in a complaint to provide notice to a defendant to prepare an adequate defense.

As indicated above, specific time frames of Ms. Durko's grievance requests were given to the Union both prior to trial and at trial. Certainly, such information allowed the Union to investigate and adequately prepare a defense to the charges.

The fact that the Union did file certain other grievances for Ms. Durko but would not include a specific sexual harassment charge is indicative that such charges were not included because of Ms. Durko's gender.

Union cites the United States Supreme Court case of *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) for the proposition that a union which intentionally avoids asserting discrimination claims can be liable under Title VII. Union tries to distinguish the *Goodman* case from the case at bar by stating:

> However, in that case, unlike here, the black union members established that the Union had ignored grievances based on instances of harassment which were indisputably racial in nature and that the Union had regularly refused to include assertions of racial discrimination in grievances that also asserted contract violations.

(Union's Petition at 23, n.12).

In the present case, the jury made a parallel finding, except that the discrimination complained of was sexual and not racial.

Based on the above evidence, it is clear that the evidence was more than sufficient to support the jury's finding that the Union discriminatorily failed to process sexual harassment grievances on Ms. Durko's behalf.

IV.

THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S AWARD, AND THE AMOUNT OF PUNITIVE DAMAGES AGAINST THE UNION, THEREBY MAKING REMITTITUR IMPROPER.

The Union's Petition for Writ of Certiorari must be denied as again alleging an erroneous factual finding in the court below, as well as a misapplication of a properly stated rule of law. Sup. Ct. R. 10.

Under Title VII, punitive damages are allowed against a respondent "[I]f the complaining party demonstrates that the Respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b).

Under the Pennsylvania Human Relations Act, a defendant must knowingly and maliciously deprive a plaintiff of her civil rights for such damages to be awarded. *Rogers v. Mt. Union Borough By Zook, supra.*

As indicated earlier, regarding testimony of Ms. Durko's efforts to file sexual harassment grievances with her Union Stewards, malice or reckless indifference to Ms. Durko's civil rights cannot be doubted.

Ms. Durko's efforts to have Union officials pursue her sexual harassment grievances were detailed earlier in this brief and will not be repeated.

Based on the Union's conduct, it can be logically concluded that the Union's complete ignorance of Ms. Durko's repeated sexual harassment complaints amounts to reckless indifference and malice.

Regarding the issue of remittitur, the Union asserts that the punitive damages awarded against it were so excessive as to require such relief.

Remittitur is available only where the verdict is so large as to offend the conscience of the court. *Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1230 (3rd Cir. 1989); *Bolden v. Southeastern PA Transp. Auth.*, 820 F. Supp. 949, 951 (E.D. Pa. 1993), *affirmed*, 1994 U.S. App. LEXIS 6575 (3rd Cir. 1994).

Union cites four cases regarding punitive damage verdicts against a union, providing examples of relatively small punitive damage awards under federal labor law statutes, such as the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.* (Union's Petition at 24-27). However, Union conveniently fails to mention other cases under the same statute, which allowed for significant punitive damage awards against a union. *See, e.g., Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2nd Cir. 1976) (punitive damages against a union totalled one hundred thousand ($100,000) dollars for improper disciplinary action against a union member); *Doty v. Sewall*, 908 F.2d 1053 (1st Cir. 1990) (punitive damages against local union of three hundred thousand ($300,000) dollars not excessive in view of Union member's exclusion from some types of Union activities for three years and ultimate removal from his position as Union Steward because of his inability to secure

a transfer); *Taliaferror v. Schiro,* 669 F. Supp. 763 (W.D. La. 1987) (punitive damages assessed against a union in the total amount of one hundred twenty thousand ($120,000) dollars, ten thousand ($10,000) dollars to each plaintiff, based on union's breach of its duty of fair representation).

Based on the severity of the actions of the Union, with its malicious and grossly indifferent attitude toward Ms. Durko's, numerous sexual harassment complaints, Ms. Durko was forced to endure repeated incidents of harassment on almost a daily basis from numerous employees, suffering repeated crying spells and loss of sleep (App. 770-772).

The Union contends that due to its size, the damages awarded are excessive. It must be remembered that in addition to *net* assets of approximately one hundred thousand ($100,000) dollars, such Union takes in approximately seven thousand ($7,000) dollars per month in local union dues (App. 778-784).

If the Union wished for its damages to be limited under 42 U.S.C. § 1981a, it should have produced evidence that would allow such limitations to be implemented.

Based on the facts of this case, it cannot be said that the conscience of the Court should have been shocked by the jury's punitive damage award of twenty-five thousand ($25,000) dollars, and therefore, the award is proper.

CONCLUSION

For the foregoing reasons, the Petition of the Union for a Writ of Certiorari should be denied.

Respectfully submitted,

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